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4 UNITED STATES DISTRICT COURT
5 NORTHERN DISTRICT OF CALIFORNIA

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7 STEVEN ANDREW LEON,
8 Plaintiff,
9 v.
10 OFFICER GUZMAN, #3968,
11 Defendant.

Case No. 17-cv-00328-HSG (PR)

SECOND ORDER OF SERVICE

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On January 23, 2017, plaintiff, a state prisoner, filed a *pro se* civil rights complaint under 42 U.S.C. § 1983 against two defendants, San Jose Police Officer Guzman and the San Jose Police Department. He has been granted leave to proceed *in forma pauperis*. The action was originally assigned to Magistrate Judge Kandis A. Westmore, but on November 7, 2017, it was reassigned to the undersigned. On June 12, 2017, Judge Westmore found the complaint stated a cognizable Fourth Amendment claim for excessive force against Officer Guzman but dismissed with leave to amend the San Jose Police Department. Plaintiff has not amended his claims against the San Jose Police Department, and the time in which to do so has passed. Accordingly, the San Jose Police Department will be dismissed from this action.

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The court sent a Notice of Lawsuit and Request for Waiver of Service of Summons to defendant Guzman at the San Jose Police Department, however no response has been received. Accordingly, the court will order the United States Marshal to serve defendant Guzman pursuant to the instructions below.

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In light of the foregoing, the court orders as follows:

1. The claims against defendant San Jose Police Department are DISMISSED without prejudice. The Clerk shall terminate this entity as a defendant on the court docket.

1 2. The Clerk shall issue summons and the United States Marshal shall serve, without
2 prepayment of fees, a copy of the complaint (dkt. no. 1), a copy of the court's June 12, 2017 order
3 of service (dkt. no. 12), and a copy of this order upon **Officer Guzman, #3968 at the San Jose**
4 **Police Department.**

5 A courtesy copy of this order shall also be mailed to the San Jose Office of the City
6 Attorney.

7 3. In order to expedite the resolution of this case, the court orders as follows:

8 a. No later than **91 days** from the date this order is filed, defendant must file
9 and serve a motion for summary judgment or other dispositive motion with respect to the claim
10 found to be cognizable in the court's June 12, 2017 order of service. If defendant is of the opinion
11 that this case cannot be resolved by summary judgment, defendant must so inform the court prior
12 to the date the motion is due. A motion for summary judgment also must be accompanied by a
13 *Rand* notice so that plaintiff will have fair, timely, and adequate notice of what is required of him
14 in order to oppose the motion. *Woods v. Carey*, 684 F.3d 934, 939 (9th Cir. 2012) (notice
15 requirement set out in *Rand v. Rowland*, 154 F.3d 952 (9th Cir. 1998), must be served
16 concurrently with motion for summary judgment).¹

17 b. Plaintiff's opposition to the summary judgment or other dispositive motion
18 must be filed with the court and served upon defendant no later than **28 days** from the date the
19 motion is filed. Plaintiff must bear in mind the notice and warning regarding summary judgment
20 provided later in this order as he prepares his opposition to any motion for summary judgment.

21 c. Defendant **shall** file a reply brief no later than **14 days** after the date the
22 opposition is filed. The motion shall be deemed submitted as of the date the reply brief is due. No
23 hearing will be held on the motion.

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25 ¹ If defendant asserts that plaintiff failed to exhaust his available administrative remedies as
26 required by 42 U.S.C. § 1997e(a), defendant must raise such argument in a motion for summary
27 judgment, pursuant to the Ninth Circuit's opinion in *Albino v. Baca*, 747 F.3d 1162 (9th Cir. 2014)
28 (en banc) (overruling *Wyatt v. Terhune*, 315 F.3d 1108, 1119 (9th Cir. 2003), which held that
failure to exhaust available administrative remedies under the Prison Litigation Reform Act,
should be raised by a defendant as an unenumerated Rule 12(b) motion). Such a motion should
also incorporate a modified *Wyatt* notice in light of *Albino*. See *Wyatt v. Terhune*, 315 F.3d 1108,
1120, n.14 (9th Cir. 2003); *Stratton v. Buck*, 697 F.3d 1004, 1008 (9th Cir. 2012).

1 4. Plaintiff is advised that a motion for summary judgment under Rule 56 of the Federal
2 Rules of Civil Procedure will, if granted, end your case. Rule 56 tells you what you must do in
3 order to oppose a motion for summary judgment. Generally, summary judgment must be granted
4 when there is no genuine issue of material fact – that is, if there is no real dispute about any fact
5 that would affect the result of your case, the party who asked for summary judgment is entitled to
6 judgment as a matter of law, which will end your case. When a party you are suing makes a
7 motion for summary judgment that is properly supported by declarations (or other sworn
8 testimony), you cannot simply rely on what your complaint says. Instead, you must set out
9 specific facts in declarations, depositions, answers to interrogatories, or authenticated documents,
10 as provided in Rule 56(e), that contradict the facts shown in the defendant's declarations and
11 documents and show that there is a genuine issue of material fact for trial. If you do not submit
12 your own evidence in opposition, summary judgment, if appropriate, may be entered against you.
13 If summary judgment is granted, your case will be dismissed and there will be no trial. *Rand v.*
14 *Rowland*, 154 F.3d 952, 962-63 (9th Cir. 1998) (en banc) (App. A).

15 (The *Rand* notice above does not excuse defendant's obligation to serve said notice again
16 concurrently with a motion for summary judgment. *Woods*, 684 F.3d at 939).

17 5. All communications by plaintiff with the court must be served on defendant's counsel
18 by mailing a true copy of the document to defendant's counsel. The court may disregard any
19 document which a party files but fails to send a copy of to his opponent.

20 6. Discovery may be taken in accordance with the Federal Rules of Civil Procedure. No
21 further court order under Federal Rule of Civil Procedure 30(a)(2) or Local Rule 16 is required
22 before the parties may conduct discovery.

23 7. Plaintiff is responsible for prosecuting this case. Plaintiff must promptly keep the court
24 informed of any change of address and must comply with the court's orders in a timely fashion.
25 Failure to do so may result in the dismissal of this action for failure to prosecute pursuant to
26 Federal Rule of Civil Procedure 41(b). Plaintiff must file a notice of change of address in every
27 pending case every time he is moved to a new facility.

28 8. Any motion for an extension of time must be filed no later than the deadline sought to

1 be extended and must be accompanied by a showing of good cause.

2 9. Plaintiff is cautioned that he must include the case name and case number for this case
3 on any document he submits to the court for consideration in this case.

IT IS SO ORDERED.

5 | Dated: 11/14/2017


HAYWOOD S. GILLIAM, JR.
United States District Judge